BEFORE

THE PUBLIC SERVICE COMMISSION

OF SOUTH CAROLINA

DOCKET NO. 2019-130-E

DOCKET NO. 2018-401-E / 2019-51-E

IN RE:	)	
	)	
Ecoplexus Inc.	)	
	)	
Complainant,	)	**ECOPLEXUS INC.'S RESPONSE TO SOUTH CAROLINA ELECTRIC & GAS'S MOTION TO DISMISS**
	)	
v.	)	
	)	
South Carolina Electric & Gas Company,	)	
	)	
Defendant.	)	
	)	

Pursuant to Commission Rule R-103-829(A), Ecoplexus Inc. ("Ecoplexus"), hereby submits this response ("Response") to Dominion Energy South Carolina's ("DESC") (formerly South Carolina Electric & Gas) May 15, 2019, Motion For Judgment on the Pleadings and to Dismiss ("Motion") the complaint filed by Ecoplexus against DESC on April 15, 2019 in Docket No. 2019-130-E[1] ("Complaint"). For the reasons set forth herein, the Commission should deny the Motion in its entirety because: 1) the Complaint, on its face, presents sufficient facts to overcome a motion to dismiss submitted under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure; 2) DESC's request to dismiss the Complaint should be construed as a motion for summary judgment, and Ecoplexus has not been afforded a reasonable opportunity to respond to

[1] Docket No. 2019-130-E was consolidated with Docket No. 2018-401-E by the Commission in Order No. 2019-293 on April 25, 2019.

a motion for summary judgment in accordance with Rule 12(b) and Rule 56, nor is granting a motion for summary judgment appropriate given that multiple issues of material fact and questions of law remain unresolved; and 3) DESC's motion for a judgment on the pleadings pursuant to Rule 12(c) is premature and should be denied.

Reply to Motion

A. The Complaint, on Its Face, Presents Sufficient Facts to Survive a Motion To Dismiss Pursuant to Rule 12(b)(6)

A motion to dismiss should not be granted if "the facts alleged [in a Complaint] and inferences reasonably deducible therefrom, *viewed in the light most favorable to the [Complainant]*, would entitle the [Complainant] to relief on *any* theory."[2] DESC correctly acknowledges this standard,[3] but does not apply it here. The Complaint outlines detailed facts and legal arguments that demonstrate how DESC's conduct with respect to the development of Barnwell PV1, a 74.9 MW-ac solar qualifying facility ("QF"), queue position 332 ("Barnwell"), and Jackson PV1, a 71 MW-ac solar QF, queue position 331 ("Jackson") (each a "Project" and collectively, the "Projects") violated the Public Utility Regulatory Policies Act of 1978 ("PURPA"), several provisions of 18 C.F.R. Section 292 (sometimes referred to herein as ""Section 292"), as well as specific Commission orders. More specifically, the Complaint described how, *inter alia*:

- DESC's current standard for establishing a legally enforceable obligation ("LEO") violates PURPA, Section 292.304(d) and Federal Energy Regulatory Commission ("FERC") precedent because it effectively requires the execution of a contract;[4]

[2] *See Carolina Park Assocs., LLC v. Marino*, 732 S.E.2d 876, 878 (S.C. 2012) (quoting *Doe v. Marion*, 645 S.E.2d 245, 247 (S.C. 2007)) (internal quotations omitted) (emphasis added).

[3] *See* Motion at 8-9.

[4] *See* Complaint at 8-12.

- In the absence of a Commission-approved, state-wide standard for establishing a LEO, the North Carolina-approved LEO standard, *which is utilized by DESC's sister company, Dominion Energy North Carolina*, is an appropriate standard to be applied by the Commission in determining whether Ecoplexus established a LEO for the Projects;[5]

- The interaction of certain terms in the power purchase agreements ("PPAs") and interconnection agreements ("IAs") offered to Ecoplexus by DESC violate Section 292.303 because they effectively make it impossible for Ecoplexus to sell the output of the Projects made available to DESC;[6]

- DESC's study, calculation and assignment of interconnection costs to the Projects was discriminatory, which violates Section 292.306(a).[7]

Accordingly, when analyzing "the facts alleged [in a Complaint] and inferences reasonably deducible therefrom" in a "*light most favorable to*" Ecoplexus,[8] Ecoplexus has set forth facts that would entitle it to relief under multiple legal theories. Thus, dismissing the Complaint would be improper pursuant to Rule 12(b)(6).

B. DESC's Motion To Dismiss is Effectively a Motion For Summary Judgment, Which is Premature At This Time

i. DESC's Introduction of Information Outside Of The Issues and Arguments Raised In The Complaint Converted Its Motion to Dismiss Into A Motion For Summary Judgment

While the Motion purports to be a motion to dismiss pursuant to Rule 12(b)(6), it introduces a substantial amount of information and evidence that were not contained within the Complaint. Table 1 below summarizes some of the additional information and evidence introduced by DESC in the Motion (collectively, "Additional Information").

[5] *See id.* at 12-15.

[6] *See id*. at 15-17.

[7] *See id.* at 17-21.

[8] *See supra*, note 2.

Table 1

	Item/Description	Citation to Motion
1.	Excerpt from Power Flow section of Projects' System Impact Studies	p. 12
2.	Glossary of Terms Used in NERC Reliability Standards	Exhibit 1, p. 2
3.	Email from John Folsom to Erik Stuebe dated August 21, 2017	Exhibit 2, p. 5
4.	Email from John Folsom to Mike Wallace dated April 16, 2018	Exhibit 2, p. 5
5.	Email from Michael Wallace to John Folsom dated April 26, 2018	Exhibit 2, p. 5
6.	Email from Michael Wallace to John Folsom dated July 9, 2018 with email thread from John Folsom of DESC to Mike Wallace dated July 6, 2018	Exhibit 2, p. 6
7.	DESC response letter from John Folsom to Michael Wallace dated August 13, 2018	Exhibit 4, p. 6
8.	Email from Fernando Blanco to Andrew Underwood/DESC dated November 19, 2018	Exhibit 5, p. 11
9.	Email from Matthew Gissendanner to Richard Whitt (Solar Developer's then-current counsel) dated July 27, 2017	Exhibit 8, p. 20
10.	Email from Matthew Gissendanner to Richard Whitt (Solar Developer's then-current counsel) dated July 19, 2017	Exhibit 8, p. 20

The introduction of this Additional Information in a motion to dismiss effectively converts DESC's motion into a motion for summary judgment. When matters outside of the pleadings (in this case the Complaint) are presented in a motion to dismiss, Rule 12(b) states that a motion to dismiss pursuant to Rule 12(b)(6) "shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."[9] In interpreting this provision of Rule 12(b), the Supreme Court of South Carolina has stated that "[i]t is our view the language of the Rule is clear, and it states plainly that the trial court may treat a 12(b)(6) motion as a motion for summary judgment and consider matters presented outside of the pleadings *if* the parties are afforded a

[9] *See* S.C.R.C.P. 12(b).

reasonable opportunity to respond to such matters in accordance with Rule 56(c) and (e) of the South Carolina Rules of Civil Procedure."[10]

ii. Procedures Related To Ruling on a Motion For Summary Judgment Have Not Been Followed

Because DESC's motion to dismiss the Complaint should instead be viewed as a motion for summary judgment, Ecoplexus must be afforded "a reasonable opportunity" to present all material made pertinent to such a motion pursuant to Rule 56.[11] However, no such "reasonable opportunity" has been afforded to Ecoplexus to date.

Of particularly relevance, a motion for summary judgment may only be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[12] However, there have been no depositions, answers to interrogatories, or other discovery to date with respect to the Complaint, nor have any procedures been established by the Commission to allow the parties in this proceeding to engage in any such discovery. Moreover, Ecoplexus has not been afforded the opportunity to submit affidavits in opposition to a motion for summary judgment, as permitted by Rule 56(e).[13] Accordingly, granting DESC's motion to dismiss (more properly a motion for summary judgment) is not appropriate on procedural grounds.

[10] *Brown v. Leverette*, 291 S.C. 364, 367 (1987) (emphasis in original).

[11] *See e.g., id.*

[12] *See* S.C.R.C.P. 56(c).

[13] *See* S.C.R.C.P. 56(e).

iii. DESC And The Commission Have Acknowledged That Additional Evidentiary Procedures Are Necessary With Respect To The Complaint

As explained in the Complaint, Ecoplexus did not submit certain information and documents in support of the arguments outlined its Complaint because portions of those documents are confidential.[14] Ecoplexus chose to first allow the Commission to establish appropriate procedures that will enable the parties to exchange confidential information with one another. At that time, Ecoplexus looks forward to providing the Commission and all parties of record with such information.

In its answer to the Complaint filed contemporaneously with the Motion ("Answer"), DESC also acknowledges that it did not submit certain information because it was confidential in nature.[15] DESC further noted that it "intends to participate in [Ecoplexus'] request that the Commission establish procedures to exchange confidential information in the underlying proceeding at a later date, after which it will be able to provide the Commission and other appropriate parties with such documents."[16]

Thus, DESC's intention to participate in further evidentiary procedures acknowledges the reality that additional fact-finding and the development of a record is needed in order for the Commission to resolve the issues of material fact and questions of law raised by the Complaint.[17] This acknowledgment by DESC effectively undercuts its request to dismiss the Complaint, because motions to dismiss and motions for summary judgment are not appropriate "where further

[14] *See* Complaint at 16 n.41, 20 n.47.

[15] *See* Answer at 6 n.6.

[16] *See id.*

[17] *See e.g.*, *Schmidt v. Courtney*, 357 S.C. 310, 319, 592 S.E.2d 326, 331 (Ct. App. 2003) ("Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." (citations omitted)).

inquiry into the facts of the case is desirable to clarify the application of the law."[18] Put another way, if granting DESC's motion to dismiss were appropriate, there would be no need engage in further evidentiary procedures that DESC has stated it intends to engage in.

Furthermore, on May 22, 2019, in denying Beulah Solar, LLC and Eastover Solar LLC's request to reconsider Order No. 2019-293, which consolidated the proceedings in Dockets No. 2019-130-E and 2018-401-E, the Commission noted that "once the Commission has ruled on the common issues, the parties will get an opportunity to then argue and brief the merits of leaving the remaining issues consolidated for hearing."[19] Additionally, on May 23, 2019, the Commission ordered oral arguments to be held on June 27, 2019, in the above-captioned proceedings.[20] Accordingly, the Commission has unequivocally indicated that further evidentiary proceedings are required in these proceedings, and therefore, the Motion should be denied.

iv. Significant Issues of Material Fact and Questions of Law Remain In Dispute and Unresolved

Granting DESC's motion to dismiss is inappropriate because there are significant issues of material fact and questions of law raised in the Complaint that are in dispute and remain unresolved. More specifically, Ecoplexus disputes DESC's characterization of many of the underlying facts connected with the development of the Projects, and disagrees with DESC's legal positions. Many of the arguments outlined in the Complaint, particularly related to DESC's evaluation and assignment of interconnection costs to the Projects in a discriminatory manner, are highly technical, and will require the development of a robust record, including in some instances

[18] *See id.*

[19] *See* Order No. 2019-369 (May 22, 2019).

[20] *See* Notice of Oral Argument, Docket Nos. 2018-401-E, 2019-51-E, 2019-130-E (May 23, 2019).

the likely submittal of affidavits by Ecoplexus' engineers and executives. Given these unresolved and disputed issues, it is not appropriate to grant DESC's motion to dismiss.

While Ecoplexus respectfully requests that the Commission order further evidentiary procedures in the above-captioned proceedings and opportunities for briefing all relevant legal issues so that it can provide the Commission and all parties of record with a detailed and complete record in support of the Complaint, Ecoplexus provides a summary of just some of those issues of material fact that need to be resolved:

- As described in the Complaint, DESC articulated different LEO standards to the Commission in 2016 and to Ecoplexus in 2018.[21] Now DESC argues that Ecoplexus has failed to demonstrate its "commitment" to sell power to DESC, and as evidence of this lack of commitment, cites the fact that Ecoplexus has not executed PPAs for the Projects and has engaged in negotiations related to PPA terms.[22] DESC also cites Ecoplexus' failure to pay the milestone payments due under the IAs as further evidence of its lack of commitment. This is inappropriate because the reason Ecoplexus has not made such payments is because Ecoplexus has challenged *the underlying legality of such payments*,[23] and the question of whether Ecoplexus needs to make the milestone payments is currently pending before the Commission.[24] Furthermore, requiring the execution of a contract in order to establish a LEO violates applicable FERC precedent.[25]

- Ecoplexus disputes DESC's erroneous position that the IAs for the Projects have terminated.[26] As noted in its April 19, 2019 letter to the Commission, DESC did not properly terminate the IAs because it failed to comply with the provisions of Section 7.6.1 of the IAs.[27] In fact, in its May 20, 2019 Response in Opposition To the Petition for Rehearing of Commission Order No. 2019-293, *DESC admitted* that a "major issue" in

[21] *See* Complaint at 8-10.

[22] *See e.g.,* Motion at 6-7.

[23] *See generally* Complaint; Motion to Maintain Status Quo, Docket No. 2019-130-E (May 15, 2019) ("Motion to Maintain Status Quo"); Letter from Weston Adams, III to Joycelyn Boyd, Chief Clerk, SC Public Service Commission, Docket No. 2019-130-E (Apr. 19, 2019) ("April 19 Letter"); Letter from Weston Adams, III to Joycelyn Boyd, Chief Clerk, SC Public Service Commission, Docket No. 2019-130-E (Apr. 23, 2019).

[24] *See generally* Motion to Maintain Status Quo.

[25] *See e.g.,* Complaint at 11-12.

[26] *See, e.g.*, Motion at 4-5, 9-10, 16.

[27] *See e.g.,* April 19 Letter.

these proceedings is the "validity of termination of the IAs."[28] Accordingly, DESC's assertion that the Projects' IAs have been terminated is in fact an open question that is pending before the Commission.[29]

- Nothing in the Motion[30] refutes the fact that if Ecoplexus executed the DESC provided PPAs for the Projects, that the PPAs would terminate by their own terms before the Projects became operational given the expected in-service dates of the Projects. This violates Section 292.303. In fact, DESC implies that because Ecoplexus "controls the complexity"[31] of the Projects, its concerns could be addressed by proposing a project with different characteristics. Ecoplexus is, however, entitled under federal law to sell the full output of the Projects made available to DESC pursuant to Section 292.303 because the Projects are QFs. Accordingly, DESC's response to the argument that the terms of the PPAs and IAs together violate Section 292.303 actually reinforces Ecoplexus' claim.

- Despite DESC's claim to the contrary,[32] the underlying case models were not shared with an Ecoplexus representative at its meeting with DESC staff on November 16, 2018. While the Ecoplexus representative was allowed to ask questions about DESC's methodologies and system impact study results, Ecoplexus' representative was not given the underlying case models or an opportunity to fully analyze the interconnection costs assigned to the Projects, and critically, verify that such costs were not made in error.

- DESC's statement that "the act of studying [DESC's system] during light load conditions does not relate in any way to evaluating or determining interconnection costs"[33] is incorrect. In Ecoplexus' experience in other jurisdictions across the United States, utilities typically study light load conditions to compare its system to high load conditions, and also to identify network infrastructure that becomes overloaded under light load conditions so that associated upgrade costs can be properly allocated to projects causing the overloads. Any such cost allocations attributable to projects under light load conditions impact total interconnection costs assigned to projects during all load conditions. By failing to evaluate its system during light load conditions, Ecoplexus believes that DESC is not properly evaluating the amount of interconnection costs assigned to the Projects.

- As noted in the Complaint, "[b]ased on Ecoplexus' review of available information and discussions with [DESC], when evaluating the need for upgrades to interconnect the

[28] *See* May 20, 2019 Response in Opposition To Petition for Rehearing or Reconsideration of Commission Order No. 2019-293, at 6 (May 20, 2019) ("[T]he Commission can resolve a major issue (validity of termination of the IAs) in each of these dockets with one decision . . .").

[29] *See, e.g.*, Motion to Maintain Status Quo.

[30] *See* Motion at 16-17.

[31] *See id.* at 16.

[32] *See id.* at 3.

[33] *See id.* at 14.

> Projects, SCE&G appears to have used facility rating criteria thresholds and methodologies *that were different and more conservative*" than what DESC included in its FERC Form 715 filing.[34] More specifically, while DESC may have "utilized the Facilities Ratings per NERC FAC-008-3 . . . just as it does for every QF seeking interconnection,"[35] Ecoplexus' also believes that DESC adds in more conservative assumptions *in addition to those prescribed by the applicable NERC standards*, when evaluating interconnection requests compared to when it evaluates interconnection upgrades associated with its own resources. Ecoplexus believes this results in costs being assigned to the Projects in a discriminatory manner.

In summary, given the foregoing procedural issues, incomplete factual record, and issues of fact and law that remain unresolved, it is not appropriate for the Commission to grant DESC's motion to dismiss, as such an action would be premature at this early stage. However, in the event that the Commission does believe that treating DESC's motion to dismiss as a motion for summary judgment is appropriate, and wishes to rule on that motion at this stage of the proceedings, Ecoplexus respectfully requests the opportunity to more thoroughly brief and present all outstanding issues in dispute and to avail itself of all applicable discovery permitted under Rule 56.

C. Granting DESC's Request For a Judgment On the Pleadings Is Not Proper

"[A] judgment on the pleadings is considered to be a drastic procedure[36]" under South Carolina law, and are thus rarely granted. As explained by the Supreme Court of South Carolina, "[a] judgment on the pleadings against the [Complainant] is not proper if there is an issue of fact raised by the complaint which, if resolved in favor of the [Complainant], would entitle him to judgment."[37] Notably, in evaluating whether to grant a request for a judgment on the pleadings, "*any* inference of law or conclusions of fact that may properly arise therefrom are to be regarded

[34] *See* Complaint at 19 (emphasis in original).

[35] *See* Motion at 12.

[36] *See Falk v Sadler*, 341 S.C. 281, 287 (2000) (citations omitted).

[37] *See id.* (citations omitted).

as embraced in the averment. Moreover, a complaint is sufficient if it states *any* cause of action or it appears that the plaintiff is entitled to *any* relief whatsoever."[38] Further, the Supreme Court of South Carolina has held that "pleadings in a case should be construed liberally so that *substantial justice* is done between the parties."[39]

Accordingly, DESC faces an even higher burden in having the Commission grant its motion for a judgment on the pleadings than it does its motion to dismiss. As discussed previously, substantial issues of material fact and questions of law remain in dispute, and further procedures are needed in order to examine these issues and properly develop a record for the Commission to evaluate. Given this, DESC has failed to demonstrate why a judgment on the pleadings is appropriate at this juncture. For these reasons, the Commission should reject DESC's motion for a judgment on the pleadings.

CONCLUSION

For the aforementioned reasons, Ecoplexus respectfully requests that the Commission accept its Response and deny the Motion in its entirety.

[*Signatures on Next Page*]

[38] *See id.* at 287-88 (citations omitted) (emphasis added).

[39] *See id.* (citations omitted) (emphasis added).

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